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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1084

NATIONAL GYPSUM COMPANY AND
PLAZA PLASTERING COMPANY,
Petitioners,

vs.

UNITED STATES GYPSUM COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Attorneys for Petitioners.

March 8, 1968.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

AUTHORITIES CITED.

Cases.

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Mercoid Corp. v. Mid-Continent Inv. Co., 320 U. S. 661, 667 (1944)	2

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REPLY BRIEF OF PETITIONERS.

The following statements of respondent require comment:

1. Respondent, in arguing that its patent does not fall within the Decree, quoted the district court and asserted the quote was a ruling in its favor on the issue (B. R. 2)*. Respondent omitted the continuing statement:

> "At any rate, I need not decide this rather complex issue. I shall assume that the Gill patent does in fact fall within the terms of the Decree" (App. 34).

2. Respondent characterizes the tape as "a material part" and "the most important element of the patented

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* Brief of Respondent in Opposition.

combination and method" (B. R. 4). That such an unpatented element is not entitled to preferential treatment was settled by *Mercoid Corp.* v. *Mid-Continent Inv. Co.*, 320 U. S. 661, 667 (1944).

3. The statement that spark tape has no substantial noninfringing use (B. R. 4, 6) is an argument, not a fact, and is contrary to the evidence. The quote from the Petition set out in the Footnote is taken out of context. The original statement by Petitioners makes no such concession.

4. Respondent argues that its specific licensees, Marvan and Evon, were licensed to make and use the invention (B. R. 5-6). The fact is that neither of them made or used the invention nor did they ever intend to. They are makers of tape and not the patented combination.

There is no evidence of a single commercial use of the patent with tape made by an end user.

5. Respondent argues that it never granted a license on condition that the spark tape be bought from it (B. R. 10, 13). This may be true as to a written condition but it is false as to an implied condition. The only licenses given to users by respondent were for use of tape bought from respondent, and only for that tape. There is no need for the condition to be expressed. "[I]t may be simply inherent in the practice of the patentee in granting licenses only to those who purchase the unpatented product from him . . ." REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, 1955 (p. 237), also citing *Leitch Mfg. Co.* v. *Barber*, 302 U. S. 458 (1938); *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495 (1942); *Barber Asphalt Corp.* v. *La Fera Grecco Contr. Co.*, 116 F. 2d 211 (3d Cir. 1940).

6. Repeatedly, respondent says that petitioners do not deny infringement. This is untrue.

Respectfully submitted,

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Date: March 8, 1968.